

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

)
Application by New York Telephone)
Company (d/b/a Bell Atlantic -)
New York), Bell Atlantic)
Communications, Inc., NYNEX Long)
Distance Company, and Bell Atlantic)
Global Networks, Inc., for)
Authorization to Provide In-Region,)
InterLATA Services in New York)

CC Docket No. 99-295

REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

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SUMMARY OF REPLY COMMENTS

The evaluations of the New York Public Service Commission ("NYPSC") and the U.S. Department of Justice are striking in the differing conclusions they reach about the adequacy of Bell Atlantic's ("BA") application. Reviewing essentially the same record, the NYPSC concludes that BA has fully met its burden, while the Justice Department concludes that while BA has made significant progress, that some significant problems remain. While the NYPSC deserves credit for the progress made in its 2 and ½ year investigation, Omnipoint submits that based upon its own experience with BA provisioning in 1999, the Justice Department's evaluation is the more appropriate determination. As the DOJ Evaluation concludes, BA has not met all of the requirements of the competitive checklist. Furthermore, as the DOJ Evaluation and the NY Attorney General agree, premature approval of interLATA entry would not serve the public interest. BA continues to fail to meet acceptable levels of DS-1 provisioning performance, as shown by Omnipoint's experienced 86% missed FOC dates from May through October, 1999, ranging from 1 to 42 days. Omnipoint urges the Commission to resist the call from BA and the NYPSC to accept BA's commitments of improved performance (without adequate penalties when unmet) at face value. The reward of interLATA entry should be provided for *demonstrated* performance, not promised performance. BA should be allowed to get no closer to the "finish line" until it undertakes performance assurance commitments and performance penalties for high capacity services such as DS-1 and DS-3 special access circuits that meet the Justice Department's criteria for effective assurance plans. Omnipoint has proposed a number of such commitments and remedies (provided to BA earlier in its November 3, 1999 *ex parte* submission) that Omnipoint believes offer a reasonable approach to the problems that Omnipoint and other carriers have had in BA's performance in provisioning high capacity

services such as DS-1 and DS-3 special access circuits. The FCC should require that these requirements be put in place as one important remaining step to the "finish line" of a local market that is "fully and irreversibly open to competition."

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REPLY COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

Omnipoint Communications, Inc. and its affiliates ("Omnipoint"), by its undersigned counsel, submits its reply comments to the initial comments of other parties, and in reply to the November 1, 1999 evaluation of the U.S. Department of Justice ("DOJ Evaluation"), to the October 19, 1999 evaluation of the New York Public Service Commission ("NYPSC Evaluation"), upon the application of New York Telephone Company's (d/b/a Bell-Atlantic - New York), et al. (collectively "BA") for authority to enter the interLATA market in New York.

The NYPSC Evaluation was the culmination of a two and one-half year Section 271 proceeding before the NYPSC (NYPSC Case 97-C-0271) begun in February, 1997. As the NYPSC Evaluation reveals, the competitive problems faced by wireless carriers like Omnipoint (i.e. provisioning of DS-1 circuits and repairing outages) were not addressed in the NYPSC proceeding. Omnipoint did not participate in that proceeding, for reasons that owe to Omnipoint's status as a wireless carrier. First, wireless carriers are not regulated or licensed by

state commissions, including the NYPSC, but rather by the FCC.^{1/} Second, unlike facilities-based CLECs that rely heavily on Section 251 and 252 state commission-approved interconnection agreements with the incumbent LEC for unbundled access to network elements to reach the customer, collocation, and resold services, as a wireless carrier Omnipoint's 271/272 contracts with BA have been limited to exchange of traffic and reciprocal compensation. Facilities that Omnipoint requires to interconnect its switches and cell site locations have been held as tariffed services. Third, Omnipoint's orders for DS-1 and DS-3 special access circuits, were pursuant to BA's state or federal access tariffs.^{2/} Significantly, the BA-proposed Performance Assurance Plan ("PAP"), developed by BA as an outgrowth of the NYPSC 271 proceeding, and as approved by the NYPSC, does not include a performance metric to evaluate BA's provisioning of special access provisioned under BA's access tariffs. Therefore, dedicated local transport purchased by Omnipoint and other wireless carriers and CLECs from BA are excluded -- inappropriately so -- from consideration in evaluating BA-NY's performance under the NYPSC PAP.^{3/} Finally, Omnipoint has been actively and regularly engaged with BA since

^{1/} 47 U.S.C. § 332(c)(3).

^{2/} See, Bell Atlantic Tariff F.C.C. No. 11, Original Page 7-108. As noted by the NYPSC, BA's Application confirms that it provides unbundled local transport by both interconnection agreement and tariff. NYPSC Evaluation at 102, citing Lacouture/Troy Declaration, App. A, Tab 1, ¶106. See also, Lacouture/Troy Declaration, App. B (citing Bell Atlantic NYPSC Tariff 916 §5.3).

^{3/} Although BA-NY claims credit for providing these services to competitors as within the scope of its compliance with the Sec. 271 competitive checklist, BA actively opposed having its performance in this bottleneck area included as a metric in the PAP. The NYPSC has up to now rejected attempts by CLECs to have such a performance measure included in the PAP. See Comments of Focal Communications Corporation at 7-8.

November, 1996 to escalate BA provisioning problems such as meeting DS-1 FOC dates and repairing DS-1 outages through meetings, conference calls and other substantial engagement of BA officials.^{4/}

I. BELL ATLANTIC'S DS-1 AND DS-3 PROVISIONING TO OMNIPPOINT HAS DETERIORATED RATHER THAN IMPROVED IN THE PAST SIX (6) MONTHS.

The NYPSC Evaluation optimistically concludes at p.44 that "[o]verall, Bell Atlantic-NY's performance in providing confirmations and rejects in a timely and accurate manner enables mass market entry by competitors." This leap of faith differs markedly from the DOJ Evaluation, which concludes that "Bell Atlantic has had substantial problems in providing timely confirmations and rejections of hot-cut orders."^{5/} Furthermore, BA has admitted in the NYPSC proceedings that "as many as 30 to 40 percent of confirmations are inaccurate...."^{6/} This is consistent with the comments by Omnipoint and other parties regarding discrepancies between BA-reported confirmations and competitor-reported confirmations.^{7/}

^{4/} See Omnipoint Initial Comments at 7-11. This included even offering to pay BA employees for overtime costs to meet FOR date commitments for DS-1 installations.

^{5/} As reported by the Justice Department using disaggregated data provided by BA to the Justice Department, in August, 1999, BA returned only 72% of order confirmations and 68% of rejections within 24 hours, well below New York's 95% standard. Its performance in June and July, 1999 "was even worse." This disaggregated BA data is consistent with Omnipoint's own experience in receiving order confirmations and rejections for its DS-1 and DS-3 special access orders, though BA's performance for special access FOCs and rejections has been even poorer than for "hot cut" performance. This can be attributed to the fact that BA has not been required to file such data with the NYPSC and its DS-1 ASR ordering performance has not been closely scrutinized before now.

^{6/} DOJ Evaluation at 16, citing NYPSC Evaluation at 81 (citations omitted).

^{7/} See, e.g., Omnipoint Comments at 7-10; Allegiance Comments at 12 ("Allegiance's data indicate that 46 percent of all DS1 level loops...ordered by Allegiance from BA-NY were

The NYPSC points to commitments by BA to improve flow through in OSS and to notify CLECs any time a trouble ticket is closed.^{8/} The NYPSC overlooks however, that demonstrated performance, not promises of future performance, is what this Commission has required in prior Section 271 Applications.^{9/} Omnipoint strongly agrees with the Justice Department's warning that reliance on promises may distort the powerful market-opening incentives of Section 271 that are the best assurance of "rapid completion of necessary market-opening measures."^{10/} As

capacity DS-3 and T-1 circuits."); NextLink Comments at 3 ("Bell Atlantic's record for meeting firm order commitment...dates for the provision of special access services to NEXTLINK has been unacceptable in the past and has impeded NEXTLINK's ability to compete in New York.")

^{8/} NYPSC Evaluation at 44, 46, 52. For example, the overall UNE flow-through rate for CLEC Orders was "approximately 60%" for August, 1999. *Id.* at 46. Again, the KPMG testing did not measure BA performance in provisioning DS-1 and DS-3 special access.

^{9/} *BellSouth Louisiana II*, 13 FCC Rcd at 20677-20687, ¶¶ 117-133); *In re Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539 (1997) ("SC Order") at ¶105.

^{10/} DOJ Evaluation at 36-37. Omnipoint cannot agree with the NYPSC Evaluation and the suggestion of at least one commenter that Bell Atlantic's commitment to satisfy unspecified special access commitment intervals (*see*, NextLink Comments at 3) constitute demonstrate "a fully and irreversibly open market in New York." As documented by the Justice Department, "a few significant problems remain." Additional problems that the Justice Department was not able to fully explore also remain. As the DOJ Evaluation mentions but does not fully evaluate, Omnipoint and a number of other parties have asserted that Bell Atlantic "often delays CLECs for weeks or months before installing interconnection trunks....These allegations, if true, would be cause for serious concern." DOJ Evaluation at 10-11, n.20.

Other commenting parties did timely bring these identical "T1 delivery delay" and missed FOC date problems of which Omnipoint complains to the attention of the NYPSC in March, 1999. *See, e.g.*, Teligent Comments, Appendix B, March 4, 1999 response letter from Teligent, Inc. to the NYPSC's February 22, 1999 Request for Information.

In Omnipoint's case, and apparently the case of other cited commenters, these were not interconnection trunks, but DS-1 and DS-3 dedicated local transport or special access circuits. Omnipoint, as explained above, did not present these problems with high capacity circuit provisioning because it was not a participant in the NYPSC's 271 proceeding.

the Commission has made clear in the past in prior section 271 applications, an RBOC applicant's "present compliance with the requirements of section 271 "is the standard of review not "promises of future performance to address particular concerns." "[P]aper promises do not, and cannot, satisfy a BOC's burden of proof [under Section 271]."^{11/}

Unfortunately, the NYPSC Evaluation offers no explanation for its failure to require a performance metric of DS-1 and DS-3 special access provisioning by BA. As the Commission has previously held in prior Section 271 applications, an RBOC must provide *equivalent* access to order status information (such as Firm Order Confirmation notices, reject or jeopardy notices, and completion notices). Unfortunately, the lack of a performance metric under the KPMG Test Plan to track BA DS-1 provisioning has not encouraged BA to improve its consistently poor provisioning by BA to Omnipoint and to other carriers.^{12/}

^{11/} *Ameritech Michigan Order*, 12 FCC Rcd at 20568, ¶44.

^{12/} Teligent Comments at 12-19; Focal Comments at 3-6. Similarly, there is an inadequate record of new installation procedures for DSL loop provisioning adopted by BA in September, 1999, or improved performance measures that were to be adopted by the NYPSC in a parallel proceeding last week. Therefore, the DOJ was unable to conclude that CLECs have access to DSL loops "necessary for them to compete effectively." DOJ Evaluation at 28. Considering that Omnipoint and other carriers reliant upon DS-1 and DS-3 special access circuits have even less assurance of "flow through" ordering through the ASR process and no performance measures have been tailored to DS-1 and DS-3 orders, a similar conclusion should be reached by the Commission about the ability of Omnipoint and other carriers' ability to compete effectively without specific performance measures and installation procedures in place for those classes of orders.

Certain commenters argue that performance data accumulated in September and October, 1999 is particularly relevant for the FCC's determination.^{13/} However, Omnipoint's data of BA missed FOCs during that period, including missed FOCs of 14, 17, 23 and 42 days, attributable to BA-caused delays, indicates that the most recent performance data is hardly indicative of sudden, acceptable improvement in BA's performance. As Omnipoint's November 5, 1999 supplemental written *ex parte* filing demonstrates, of twenty-eight (28) BA Firm Order Commitments for DS-1 provisioning between May and October, 1999, *86% of the FOC dates were missed by BA, ranging from a delay of 1 to 42 days*. Therefore, even if certain BA performance in aggregated, CLEC-focused PAP metrics has improved in September data, BA is not provisioning high capacity special access in a satisfactory, timely, and nondiscriminatory manner.

II. LACK OF DEMONSTRATED PERFORMANCE IN PROVISIONING AND REPAIR IS EVEN MORE WORRISOME SINCE BELL ATLANTIC'S FAILURE TO INSTALL HIGH CAPACITY FACILITIES ON TIME WILL FURTHER DETERIORATE DUE TO THE DEMANDS ON FACILITIES TO SERVE THE INTERLATA MARKET.

Without specific performance measures or financial disincentives (such as monetary penalties) in place for inadequate provisioning of essential, bottleneck services, certain commenters such as Teligent argue that premature interLATA entry by BA will not only remove powerful incentives under Section 271 for BA to complete necessary market-opening conditions, but that BA's "continuing provisioning problems will only be exacerbated."^{14/} Omnipoint agrees.

^{13/} See e.g., NY Attorney General's Comments at 39-40 ("In particular, the Commission should consider...the [BA] performance data for September, 1999...."). ; Allegiance Comments at 14.

^{14/} Teligent Comments at 19.

As discussed in Omnipoint's initial comments at 8, n.15, Omnipoint's own high capacity dedicated local transport orders for DS-1 special access circuits are more than double those BA-NY has recorded for the entire CLEC industry through July, 1999. Many of these DS-1 special access circuits are provisioned through the use of interoffice facilities that BA will need to construct its network to access tandems to carry substantial amounts of interLATA traffic generated by BA-NY's customers.^{15/} These are the same interoffice facilities that BA-NY continually cites as the cause of missed commitment dates. Where will the facility resources be found to provision BA's new interLATA network if BA cannot timely fill Omnipoint DS-1 Orders now? While both may *potentially* be provisioned satisfactorily by BA, the record strongly suggests that a premature grant of interLATA entry to BA in New York will not improve already deficient provisioning and repair of DS-1s and DS-3s by BA.

III. THERE MUST BE ADEQUATE PERFORMANCE INCENTIVES IN PLACE TO ENSURE THAT BA PROVIDES NONDISCRIMINATORY UNBUNDLED ACCESS TO DEDICATED, HIGH CAPACITY LOCAL TRANSPORT SERVICES TO BA'S COMPETITORS BEFORE BA OBTAINS AUTHORITY UNDER 47 U.S.C. § 271 TO ENTER THE INTERLATA MARKET IN NEW YORK.

As the DOJ Evaluation discusses in detail, BA's performance plan and total remedies for poor performance, are more illusionary and filled with loopholes than designed to ensure that local markets are "fully and irreversibly open to competition."^{16/} Omnipoint agrees that it would be unwise to rely on these plans rather than the "more powerful incentives created by Section

^{15/} As noted by the DOJ Evaluation, with over 18 million inhabitants and seven LATAs, New York recorded the nation's fourth largest total for any state in long distance traffic in 1998, with over 43 million interLATA billed access minutes, or 6.3% of the total for the entire country. DOJ Evaluation at 8-9, & n.15.

^{16/} DOJ Evaluation at 36-40.

271, to ensure rapid completion of necessary market-opening measures."^{17/} As discussed in its initial comments and extensively by other commenters, the BA performance plan does not provide severe enough penalties sufficient to deter poor performance. Also, because of the aggregation of data, particularly poor performance to one carrier or in one area of provisioning can be offset by good performance to another carrier or in another area of provisioning. However, if the poor performance is to a carrier that relies heavily (whether for a small or large amount of orders) in one area where the performance is inadequate, the anticompetitive impact can be disproportionately higher than the PAP can adequately address. This is particularly true in Omnipoint's case, where it must rely exclusively on BA for provisioning of DS-1 special access circuits for which there is not even a performance metric that was evaluated in the KPMG Test Plan.

Late FOCs and lengthy DS-1 outages delay Omnipoint's market buildout, and result in lost goodwill, and lost Omnipoint customers. In short, customers will go elsewhere --perhaps to Bell Atlantic-- if a new entrant does not meet their expectations, even if the cause is inadequate incumbent LEC provisioning. As the Justice Department argues, there must be "clarity," "certainty," and "adequate penalties" for performance assurance plans to be effective. Otherwise, continued inferior dedicated local transport provisioning is inevitable to the wireless industry and BA backsliding will result once the interLATA entry "carrot" has been won. The NYPSC performance plans will not be effective because they do not meet these criteria. Any performance assurance plans the Commission approves should include the following criteria for

^{17/} *Id.* at 37.

DS-1 and DS-3 services as set forth in Omnipoint's written ex parte filing to the FCC on November 3, 1999:

- For New Installations of DS-1 Dedicated Transport Circuits:
 - 1) FOC dates must meet committed intervals as set forth in the applicable tariffs.
 - 2) FOC dates, once issued, may not be unilaterally changed by BA.
 - 3) BA should provide 5 day advance written/email notice of BA-missed FOC date, or rescheduling of FOC date, and precise cause(s) for it.
 - 4) BA performance credits for missed FOC dates other than "customer not ready" or "acts of god" as follows: \$100. first day, \$500. second day; \$1,000. third day and each day thereafter per equivalent number of DS-1 circuit(s).
 - 5) 100% credit for non-recurring installation charges for each missed FOC date.
 - 6) BA must obtain responsible Omnipoint representative's agreement that "Customer Not Ready" ("CNR") justification applies *before* BA unilaterally creates a CNR business record for an installation or repair.
 - 7) Require BA to implement, within three (3) months of the FCC's Order in CC Docket No. 99-295, a detailed OSS tracking system specifically for DS-1 and DS-3 orders for wireless carriers.
- For DS-1 Outages:
 - 1) When an Omnipoint technician's presence is necessary (i.e. access is denied to a building site or an Omnipoint technician's presence is necessary for troubleshooting), require BA to commit to a 2 hour window for its technician to meet an Omnipoint technician on-site. Missed appointments by either party will be reciprocally compensable by the non-appearing party to the appearing party at the BA tariffed or other customary hourly billing rate for its technicians.
 - 2) Require BA to reciprocally compensate Omnipoint for its technician time (at the usual BA technician rate) at the site following a BA demand for Omnipoint technician at the site when there are no access problems or the cause of the DS-1 outage is a BA network problem.
 - 3) Require BA to obtain Omnipoint acceptance of a DS-1 dedicated transport circuit after BA maintains that the circuit's operation is properly restored.

IV. CONCLUSION

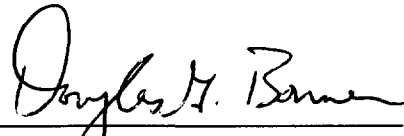
For these reasons, and those discussed in its Initial Comments, Omnipoint respectfully submits that BA's Application for InterLATA entry in New York should be denied, since it has

not fully and irreversibly opened the local market to competition, and because premature approval would not be in the public interest.

Respectfully submitted,

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Dated: November 8, 1999